Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1358

HANDY HARDWARE WHOLESALE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Handy Hardware Wholesale, Inc., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 10, 1976, enforcing the Order of the National Labor Relations Board issued on January 16, 1976. A copy of the Judgment is reprinted in Appendix C, commencing on Page A-30.

Opinions Below

The decision and Order of the National La-

bor Relations Board is reported as Handy Hardware Wholesale, Inc., 222 N.L.R.B. 373 (1976). The opinion of the Court of Appeals for the Fifth Circuit is reported at 542 F2d 935. Both the decision and Order, and the opinion, are reprinted in the Appendix A and Appendix B, commencing on Pages A-1 and A-23 respectively.

Jurisdiction

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 10, 1976. The Court of Appeals subsequently entered, on January 10, 1977, an Order denying a Petition for Rehearing. A copy of the Order is reprinted in the Appendix D, commencing on Page 32. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

Petitioner filed an objection to the election alleging participation by a supervisory

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Handy Hardware Wholesale, Inc., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 18, 1976, enforcing the Order of the National Labor Relations Board issued on January 16, 1976.

Opinions Below

The decision and Order of the National Labor Relations Board is reported as Handy Hardware Wholesale, Inc., 222 N.L.R.B. 373 (1976). The opinion of the Court of Appeals for the Fifth Circuit is reported at 542 F2d 935. Both the decision and Order, and the opinion, are reprinted in the Appendix commencing on Pages A-1 and A-13 respectively.

Jurisdiction

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 10, 1976. The Court of Appeals subsequently entered, on January 10, 1977, an Order denying a Petition for Rehearing. A copy of the Order is reprinted in the Appendix commencing on Page A-13 . The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

Petitioner filed an objection to the election alleging participation by a supervisory

employee in the pre-election propaganda and pre-election union organizational campaigns. The objection was overruled by the Regional Director and a requested hearing denied, despite the admitted union activities of the employee, and significant evidence of his supervisory status submitted by Petitioner.

The election was certified, and, when Petitioner refused to recognize the union, complaint issued. Petitioner's answer denied the complaint allegation of a continuing union request to bargain. General Counsel for Respondent filed a Motion for Summary Judgment, which Petitioner opposed, because of unresolved factual issues. General Counsel for Respondent then amended its Motion to include allegations of recent union requests to bargain, one of which post-dated Petitioner's answer denying such requests. The complaint was never amended. Respondent granted Summary Judgment, and found union requests to bargain on the specific in-

stances alleged for the first time in the amended Motion of General Counsel for Respondent.

The questions presented for review are whether Petitioner was denied due process of law by Respondent's refusal to hold a hearing on Petitioner's objection to the election, and by Respondent's finding of violations neither alleged in the complaint nor litigated at a hearing.

Statement

Petitioner, a Texas corporation with its principal place of business in Houston, Texas, is engaged in the warehousing and wholesale distribution of consumer hardware lines. On May 10, 1974, the Teamsters Union filed a petition seeking to represent a unit of the Petitioner's employees. At about the same time, Petitioner received, from the Union, a letter requesting recognition. The letter stated that Dennis Baker and another individual employed by Petitioner were recognized by the Union as "organizers for the employees."

Dennis Baker was employed by Petitioner in June, 1972, as a stocker and order filler in the warehouse at the rate of $2.00 per hour. There was only one salaried employee in the warehouse, the warehouse superintendent, Robert S. Smith; under Smith were four supervisors, and a staff of twenty-five. Smith did all of the actual hiring and firing, although the four supervisors had the authority to recommend hiring and firing, and raises. Several months prior to the filing of the petition, Baker was promoted to fill a newly created post of supervisor in the bulk area section. The first man to fill the post was hired for the position, but lasted only a week. A. F. McClellan, the President of Petitioner, suggested Baker for the job, and had a talk alone with Baker about the job and then a meeting with Smith and Baker together. McClellan and Smith told Baker that he would supervise the stocking of items in areas 2, 3, and 4 of the warehouse. Baker accepted the job, and was

promoted immediately with a crew of five. His raise to $3.75 per hour, made his hourly rate at least $1.00 per hour higher than any non-supervisory employee in the warehouse. Although Baker was told of his authority to effectively recommend discharges of employees he supervised, he never did so recommend, and no one under him was in fact ever discharged. On the other hand, Baker did recommend raises for two employees which were granted. Each morning after Baker's promotion to supervisor, Smith would meet with Baker in the morning, show him the receiving reports, and discuss what was in or coming in to be stocked. From that point on, Baker would be in charge of the stock work in his area, and would issue appropriate instructions to the employees under him. After Baker's promotion, those employees were told by Smith that in the future their instructions would come from Baker only. Baker was also responsible for theft in his area, and for all equipment used by his men,

such as electric lifts and hydraulic pallet jacks. Following his promotion to supervisor, Baker did work as a stocker when not performing his supervisory duties, but no longer worked as an order filler.

McClellan told Smith about the Union letter naming Baker as an organizer of employees, and the following morning, following the starting bell, Baker approached Smith and requested a conference. Baker said he could no longer act as a supervisor (Baker's words). He said he would have to quit if Petitioner refused to demote him to his former non-supervisory status. Smith responded that Baker was putting him in a spot, because Baker's crew was waiting on instructions. Baker continued to refuse to carry out his supervisory duties, and, until terminated, reverted to his former position of stocker and order filler. On May 21, 1974, Baker was terminated. The next morning McClellan called a meeting of employees, explained to them that Baker had been terminated for engaging in Union activities while

a supervisor and made it clear that rank-and-file employees were free to engage in activities for or against the Union, as each individual saw fit.

Pursuant to a stipulation for certification upon consent election, Respondent concluded an election on July 3, 1974, in a unit composed of:

> All truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters but excluding office clerical employees, sales and commission employees, watchmen, guards and supervisors as defined in the Act.

The tally of ballots showed that 33 ballots were cast, of which 19 were for the Union, 1 against, and 13 were challenged. The challenged ballots were not sufficient in number to affect the results of the election and were not resolved. The ballots of the other three warehouse supervisors, whose duties were identical to those of Baker's were challenged by the Union on the basis that they were supervisors.

It is undisputed that Baker engaged in acti-

vities in behalf of the Union. In fact, he "was behind the Union", the leader of the group of employees making the organizational effort, and on at least one occasion sent one employee to threaten another employee in an attempt to acquire her signature on an authorization card. He engaged in Union activities on the job until he was terminated, and held at least one meeting of employees on Petitioner's parking lot, prior to the election. On May 23, 1974, Baker filed charges with Respondent alleging that his discharge was unlawful, and complaint issued on June 25, 1974. Baker attended a Union meeting for Petitioner's employees the weekend before the election, during which they were told that Baker would get his job back. Petitioner, in fact, as part of a settlement, did later offer Baker reinstatement.

On July 9, 1974, the Petitioner filed timely objections to the election, one of which alleged that the Union utilized the services of one of the Petitioner's supervisors in the Union's

organizational and pre-election propaganda campaign. The Petitioner asked that the election be set aside and that all necessary and proper measures be taken to remedy the results of the actions objected to, and to provide an atmosphere free from coercion and intimidation prior to the holding of another election. On August 8, 1974, in a statement of position, Petitioner stated "that the election should be set aside on the basis of evidence in possession of Respondent, and, in failing that, a hearing should be held to adduce more evidence."

On August 30, 1974, following an ex parte administrative investigation, the Regional Director, refusing to hold a hearing as requested, issued his Report on the objections recommending that the objections be overruled.

On September 9, 1974, the Petitioner filed exceptions to the Regional Director's Report, pointing out, among other things, five misstatements of fact and eight omissions of fact in his

Report concerning the objection as to the Union's utilization of the services of one of the Petitioner's supervisors in the Union's organizational and pre-election propaganda campaign. Petitioners against asked that the election be set aside on the basis of evidence in possession of Respondent, or, in the alternative, that a hearing be directed.

On November 14, 1974, Respondent issued a Decision and Certification of Representative adopting the findings and recommendations of the Regional Director's Report, and certifying the Union.

Upon a charge filed by the Union, the Regional Director, on December 24, 1974, issued a complaint alleging that Petitioner's refusal to bargain with the certified Union since November 15, 1974, violated Section 8(a)(5) and (1) of the National Labor Relations Act. Petitioner's answer to the complaint denied, among other things, the alleged continuing request to bargain by the Union.

On January 17, 1975, the Respondent's General Counsel filed a motion to transfer and continue the case before Respondent and for a summary judgment, asserting that no triable issues of fact existed. Petitioner opposed the motion for summary judgment, on January 28, 1975, and submitted that the issues raised by the answer were substantive, and both factual and legal, and moved that the complaint be dismissed, or a hearing ordered to resolve the issues.

On February 7, 1975, the Respondent's General Counsel filed its Amendment to Motion to Transfer and Continue Case Before Board and for Summary Judgment and Response to Respondent's Opposition to Motion to Transfer and Continue Case Before Board and for Summary Judgment and Motion to Strike portions of Petitioner's Original Answer as Constituting Sham. The above document addressed itself, among other things, to that part of the answer which stated that Petitioner was without knowledge or information suf-

ficient to form a belief as to the truth of the allegation of Paragraph 10 of the complaint, which contains an allegation of a continuing request to bargain by the Union. In answer to Petitioner's opposition to summary judgment, dated January 28, 1975, and to support the above allegation in the complaint, which issued on December 27, 1974, the Respondent's General Counsel, in its February 7, 1975, pleading, attached a copy of a Union request to bargain dated January 16, 1975. The next preceding Union request alleged by the Respondent's General Counsel is dated December 5, 1974. Respondent's General Counsel never amended, or attempted to amend, the complaint.

On February 12, 1975, Petitioner filed an opposition to Respondent's General Counsel's February 17, 1975, pleading, pointing out, among other things, that the General Counsel's pleading was apparently an attempt to amend Paragraph 10 of the complaint without complying with

Section 102.17 of the National Labor Relations Board's Rules and Regulations, and that Petitioner's answer to Paragraph 10 of the complaint was directed to that portion thereof alleging that the Union request for the Petitioner to meet and bargain was not limited to November 15, 1974, but also as "at all times thereafter to date." It stated that Respondent's General Counsel, by propounding by motion new allegations of subsequent Union requests for bargaining, one of which is alleged to have occurred after filing of the complaint, was attempting to eradicate a fact issue raised by the answer, and thereby improperly obtain summary judgment.

On February 14, 1975, Respondent issued an order transferring the proceeding to Respondent and a notice to show cause why the motion for summary judgment should not be granted.

On February 18, 1975, Petitioner filed an application for stay of the order transferring the proceeding to Respondent and the notice to

show cause, assuming that its February 12, 1975 opposition was not received by Respondent prior to issuance of the order and notice.

On June 12, 1975, Respondent issued an order denying the application, stating that the issues raised by Petitioner's opposition and application could better be resolved after receipt of the responses to the notice to show cause.

On July 1, 1975, Petitioner filed a response to the notice to show cause, pointing out that a summary judgment did not lie because of unresolved issues of fact, despite Respondent's General Counsel's improper attempt to eradicate the issues, and that a hearing was required to resolve issues raised by Petitioner's objections to the election.

On July 1, 1975, Petitioner also filed motions for reconsideration and to revoke certification, pointing out, among other things, that the certification of the Union was invalid in that the Regional Director was in possession of facts sufficient to establish a prima facie case to set aside the election, and that if controverting facts were also known by the Regional Director, a hearing was in order to resolve factual issues. The motions were denied by the Respondent in a telegram dated July 18, 1975.

On January 16, 1975, Respondent issued a decision and order granting the General Counsel's motion for summary judgment, and finding that Petitioner's refusal to recognize and bargain with the certified Union violated Sections 8(a)(5) and (1) of the National Labor Relations Act. Respondent's order requires Petitioner to cease and desist from the conduct found unlawful, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of statutory rights. Affirmatively, the order requires Petitioner to bargain collectively upon request with the Union, and to post notices.

On November 18, 1976, Respondent's order was enforced by the United States Court of Appeals for the Fifth Circuit, which had jurisdic-

tion of the application by virtue of Section 10 (e) of the National Labor Relations Act, as Amended.

Constitutional and Statutory Provisions Involved

United States Constitution

Amendment V

"No person shall....be deprived of life, liberty, or property without due process of law..."

Statutes (In Pertinent Part)

National Labor Relations Act, §8(a)(1) and (5), 29 U.S.C. §158(a)(1) and (5).

(a) It shall be an unfair labor practice for an employer -

"1." To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title;

* * *

"5." To refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159(a) of this Title."

National Labor Relations Board Rules and Regulations, "Complaint - When and by Whom Issued; Contents; Service", §102.15 [29 C.F.R. §102.15].

"After a charge has been filed, if it ap-

pears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all other parties a formal complaint in the name of the Board stating the unfair labor practice and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed. [23 F.R. 7972, Aug. 6, 1963].

National Labor Relations Board Rules and Regulations, "Complaint - Amendment", §102.17 [29 C.F.R. §102.17].

"Any such complaint may be amended upon such

terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board."

National Labor Relations Board Rules and Regulations, §102.69(f), [29 C.F.R. §102.69(f)].

"In a case involving a consent election held pursuant to §102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Baord that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it ap-

pears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer...."

Administrative Procedures Act, §554(b)(3), (5 U.S.C.A. §554(b)(3)).

"Persons entitled to notice of an agency hearing shall be timely informed of.... the matters of fact and law asserted."

Reasons for Granting the Writ

One reason for granting the Writ is that the questions presented arise from an extreme example of a typical instance of administrative abuse by Respondent, a consequence of which is frequent disobeyance of Respondent's orders. The resulting litigation often concerns, as here, important Federal questions which arise in the area of Respondent's adminstrative discretion, and which should be resolved in this Court. The two questions presented here, the circumstances

in which Respondent must hold a hearing, and the extent which Respondent must adhere to procedural rules and standards, are among the most litigated.

Another reason for granting the Writ is that this case represents, in its entirety, such flagrant denial of procedural due process as to call for an exercise of this Court's power of supervision.

Respondent's refusal to hold a hearing after Petitioner had submitted a prima facie case for setting aside the election, when Respondent was in possession of conflicting evidence, violated Respondent's own Rules and denied procedural due process.

The evidence submitted by Petitioner to the Regional Director in support of its Objection 3 to the election, under long-established Fifth Circuit law, clearly sets forth a prima facie case for setting aside the election. Thus, Petitioner's evidence demonstrated that Baker was

a supervisor, that he was the spark plug and the spearhead of the union organizational and pre-election propaganda campaigns, and that the Company promptly terminated Baker after learning of his union activities. (See N.L.R.B. v. Air Control Prod. of St. Petersburg, Inc., 335 F2d 245 (5th Cir., 1966); and N.L.R.B. v. Lamar Elec. Membership Corp., 362 F2d 505 (5th Cir., 1966).

That the Regional Director was in possession of conflicting evidence, is indicated by the disparity between his Report and the affidavits and other evidence submitted by Petitioner. Respondent's own Regulations provide, in stipulated consent elections, for a post-election hearing to resolve objections to an election "if it appears to the Board that such exceptions raise substantial and material fact issues...." [29 C.F.R. §102.69(f)].

Respondent's finding of violations neither alleged in the complaint nor litigated at a hearing violates the Administrative Procedures Act,

Respondent's own Rules and Regulations, and procedural due process. The Administrative Procedure Act, 5 U.S.C. §554(b) provides that: "Persons entitled to notice of an agency hearing shall be timely informed of....the matters of fact and law asserted." Respondent's own Regulation, at 29 C.F.R. §102.15, states:

"After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to

constitute unfair labor practices, including where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

Further, an impressive line of Fifth Circuit and other cases hold specifically that findings of violations neither alleged nor litigated at a hearing may not be made (See, e.g. Boyles Corned Beef Co. v. N.L.R.B., 400 F2d 154 (8th Cir., 1968); Engineers & Fabricators, Inc. v. N.L.R.B., 376 F2d 482 (5th Cir., 1963); and N.L.R.B. v. Tamper, Inc., 522 F2d 78 (4th Cir., 1975). As the Court said in Engineers & Fabricators, Inc., supra, at p. 485:

"It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing."

Respondent, in refusing to require its General Counsel to amend the complaint after the defect was pointed out by Petitioner, de-

monstrated an administrative arrogance and contempt for procedural due process which should not be countenanced, particularly when Respondent's own Regulations (29 C.F.R. §102.17) allow for amendment of complaint almost at will.

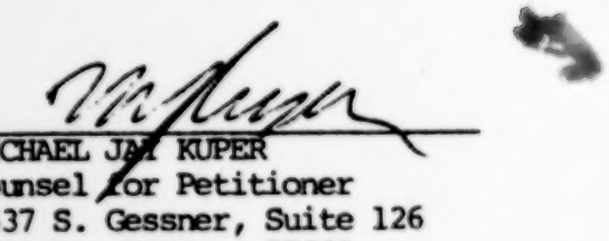
Apparently, the notice requirement in the complaint amendment regulation is offensive to Respondent, and would interfere with its obvious desire to "railroad through" its order in this case.

This is a case in which Respondent has denied Petitioner due process at every opportunity. The administrative handling of this matter reeks of abuse and should be corrected. The volume of litigation among the Courts of Appeal in the areas involved testifies that this was not an isolated instance, and that this Court's guidance is urgently needed.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for a

Writ of Certiorari should be granted



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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANDY HARDWARE WHOLESALE, INC.

and Case 23-CA-5396

TEAMSTERS, GENERAL DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 968

DECISION AND ORDER

Upon a charge filed on December 18, 1974, by the Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968, herein called the Union, and duly served on Handy Hardware Wholesale, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 23, issued a complaint on December 27, 1974, against Respondent, alleging that Respondent had engaged in and was engaging

in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 13, 1974, following a Board election in Case 23--RC--4098, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1/] and that, com-

1/ Official notice is taken of the record in the representation proceeding, Case 23--RC--4098, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F2d 683 (C.A. 4, 1963); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F2d 26 (C.A. 5, 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C. Va., 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

mencing on or about November 15, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 6, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 20, 1975, counsel for the General Counsel filed directly with the Board a Motion to Transfer and Continue Case Before the Board and for Summary Judgment. On January 30, 1975, Respondent filed an opposition thereto. On February 10, 1975, counsel for the General Counsel filed an amendment to his Motion, a response to the Respondent's opposition, and a motion to strike portions of Respondent's answer as sham. Subsequently, on February 14, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To

Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On February 18, 1975, Respondent filed an opposition to the General Counsel's February 10, 1975, amendment, his response to opposition, and his motion to strike; and on February 20, 1975, it filed an Application to Stay the Order Transferring the Proceeding to the Board. On June 12, 1975, the Board denied Respondent's application to stay. Respondent thereafter filed a response to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[2/] the Board makes the following:

Ruling on the Motion for Summary Judgment

2/ The General Counsel's amendment to his motion to transfer and for summary judgment is hereby granted.

In its answer to the complaint, its opposition to the motion for summary judgment, and to the amendment thereto, and in its response to the Notice To Show Cause, Respondent basically questions the validity of the underlying representation proceeding and the resulting certification of the Union because of its objections to the election and the failure to hold a hearing thereon, which it now requests. In addition, the Respondent asserts there are issues as to the allegations of a request and refusal to bargain which require a hearing. We find no merit in the Respondent's contentions.

An examination of the record in Case 23—RC—4098 reveals that an election conducted on July 3, 1974, pursuant to a Stipulation for Certification Upon Consent Election resulted in a vote of 19 for and 1 against the Union, with 13 challenged ballots which were not sufficient to affect the results of the election. Respondent filed timely objections to conduct affecting the

results of the election, alleging, in substance, that an official notice of election was defaced to show a preference for the Union, that an employee was threatened in order to secure her signature on a union authorization card, and that the Union utilized the services of one of Respondent's supervisors in its preelection campaign. After investigation, the Regional Director, on August 30, 1974, issued his Report and Recommendations on Objections to Conduct Affecting the Results of the Election in which he recommended that the objections be overruled in their entirety and that the Board certify the Union. Respondent filed timely exceptions to the Regional Director's report and the Board, on November 13, 1974, issued a Decision and Certification of Representative in which it adopted the findings and recommendations of the Regional Director and certified the Union as exclusive bargaining representative of employees in the stipulated appropriate unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3/]

All issues, except as discussed hereinafter, raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigatable in this unfair labor practice proceeding.[4/]

3/ See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

With respect to its contention that it is entitled to a hearing on its objections, we find it to be without merit as the Board has held, with judicial approval, that evidentiary hearings are not required in unfair labor practice cases where, as here, there are no substantial or material facts to be determined and in such cases summary judgment is appropriate.[5/]

The Respondent also contends that its answer alleging lack of knowledge of requests to bargain and a denial of a refusal to bargain raises issues warranting a hearing. We disagree. In his amended motion, counsel for the General

4/ In addition to its attack upon the validity of the underlying representation proceedings, the Respondent, in its answer, also denies its status as an employer engaged in commerce, the Union's status as a labor organization, and the appropriateness of the unit. These matters were stipulated by the Respondent and were so found in Case 23--RC--4098 and may not be relitigated herein.

5/ Janler Plastic Mold Corporation, 191 NLRB 662 (1971); Crest Leather Manufacturing Corporation, 167 NLRB 1085 (1967), and the cases cited therein.

Counsel has alleged letter requests for bargaining dated November 15 and December 5, 1974, and January 16, 1975, supported by attached Exhibits P, Q, and R, two of which show service by certified mail. The contents of these letters have not been controverted by the Respondent and therefore are deemed to be true, and establish requests to bargain from November 15, 1974. Further, the allegation of counsel for the General Counsel that the Respondent has failed to respond to the requests despite the passage of a reasonable time stands uncontroverted and is accepted as true, and establishes the refusal to bargain as of November 15, 1974.[6/] Accordingly, we shall grant the General Counsel's Motion for

6/ Jason/Empire, Inc., 212 NLRB No. 21 (1974). The Respondent also denies, because of alleged lack of knowledge, the filing and serivce of the unfair labor practice charge as alleged in the complaint. Attached to the General Counsel's Motion for Summary Judgment as Exhs. A and B are copies of the charge and the affidavit of service thereof. These exhibits stand uncontroverted and are deemed to be true, and establish the filing and service of the charge as alleged.

Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Texas corporation with its principal office and place of business in Houston, Texas, is engaged in the wholesale distribution of commercial hardware. During the past 12 months Respondent purchased goods and materials valued in excess of $50,000.00 from suppliers located outside the State of Texas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968 is a labor

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organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters, but excluding office clerical employees, sales and commission employees, watchmen, guards and supervisors as defined in the Act.

2. The certification

On July 3, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 23 designated the Union as their representative for the purpose of collective bargaining with the Respond-

ent. The Union was certified as the collective-bargaining representative of the employee in said unit on November 13, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about November 15, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 15, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 15, 1974, and at all times thereafter, refused to bargain collectively

with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively

ly with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962), enfd. 328 F2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Handy Hardware Wholesale, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968 is a labor organization within the meaning of Section 2(5) of the Act.

3. All truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters, but excluding office clerical employees, sales and commission employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 13, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the mean-

ing of Section 9(a) of the Act.

5. By refusing on or about November 15, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Handy Hardware Wholesale, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters, but excluding office clerical employees, sales and commission employees, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner in-

terfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Houston, Texas, copies of the attached notice marked "Appendix."[7/] Copies of said notice, on

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7/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forms provided by the Regional Director for Region 23 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23 in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. Jan. 16, 1976

_____
Howard Jenkins, Jr., Member

_____
John A. Penello, Member

_____
Peter D. Walther, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment,

and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters, but excluding office clerical employees, sales and commission employees, watchmen, guards and supervisors as defined in the Act.

Dated_____

HANDY HARDWARE WHOLESALE, INC.
(Employer)

By:_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002

Telephone 713--226--4722.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HANDY HARDWARE WHOLESALE, INC., Respondent.

No. 76-1793
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Nov. 18, 1976.

The National Labor Relations Board sought enforcement of its order that an employer bargain collectively with a union which had won a representation election. The Court of Appeals, Clark, Circuit Judge, held that the NLRB properly denied a hearing on the employer's contentions concerning alleged defects in the election.

Enforced.

1. Constitutional Law ⇐275(5)

National Labor Relations Board's regulations providing for hearing when "substantial and material factual issues" as to propriety of representation election are present comported with all requirements of due process. National Labor Relations Act, §§ 1 et seq., 8(a)(1, 5) as amended 29 U.S.C.A. §§ 151 et seq., 158(a)(1, 5).

2. Labor Relations ⇐673

Because of large degree of discretion accorded to National Labor Relations Board in its determination whether to hold hearing on propriety of manner in which representation election was held, considerable weight must be assigned to Board's determinations and judicial review must be limited to reasonableness of such determination; it does not matter that reviewing court might have reached different conclusions if Board has resolved case reasonably. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

3. Labor Relations ⇐214

National Labor Relations Board acted reasonably in denying credence to employer's argument that altered sample ballot on NLRB poster announcing representation election did not necessitate hearing on propriety of manner in which election was conducted. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

4. Labor Relations ⇐214

Burden is on party seeking to overturn representation election to show by specific evidence not only that unlawful acts occurred but also that such acts sufficiently inhibited free choice of employees as to affect materially the results of election. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

5. Labor Relations ⇐596

National Labor Relations Board acted reasonably in accepting regional director's conclusion that evidence that demand was made on employee "for the last time" that she sign union authorization card showed, at best, only ambiguously a threat. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

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6. Labor Relations ⇐210

Participation of supervisor in union election undermines "laboratory conditions" necessary for unfettered choice. National Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

7. Labor Relations ⇐207

National Labor Relations Board's determination as to whether employee is "supervisor" within meaning of National Labor Relations Act is entitled to great weight, as expertise of Board is uniquely capable of measuring subtle gradations of authority which delineates supervisor from nonsupervisory personnel. National Labor Relations Act, § 2(11) as amended 29 U.S.C.A. § 152(11).

8. Labor Relations ⇐211

National Labor Relations Board acted reasonably in determining that since employee who was allegedly supervisor had not been employed by employer during last six weeks of representation election period, impermissible coercion resulting from such employee's favoritism for union was inconceivable. National Labor Relations Act, § 2(11) as amended 29 U.S.C.A. § 152(11).

9. Labor Relations ⇐683

Where union's complaint before National Labor Relations Board alleged refusal of employer to bargain "to date," it sufficiently notified employer of grounds of charges against it and employer was not prejudiced by action of counsel for Board in amending motion for summary judgment so as to allege additional instance of failure to bargain which was relevant and obviously an outgrowth of earlier allegation. National Labor Relations Act, § 10(b) as amended 29 U.S.C.A. § 160(b); App. 29 U.S.C.A. Rules and Regulations, § 102.15; 5 U.S.C.A. § 554(b).

On Application for Enforcement of an Order of the National Labor Relations Board (Texas Case).

Before DYER, CLARK and HILL, Circuit Judges.

CLARK, Circuit Judge:

The National Labor Relations Board (Board) seeks enforcement of its order that Handy Hardware Wholesale, Inc. (Handy Hardware) bargain collectively with the Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968 (the Union). After an election, the Board certified the Union as the official representative of a unit of employees at Handy Hardware. Handy refused to bargain by alleging three improprieties attributable to the Union during the representation election campaign. The Board rejected all three allegations in a summary judgment. Handy Hardware contends before this court that the Board's refusal to accord it a hearing on its allegations and the Board's grant of leave to its General Counsel to amend the complaint deprived it of due process. Rejecting the contentions of Handy Hardware, we enforce the Board's order to bargain.

Handy Hardware is a Texas corporation engaged in the wholesale distribution of commercial hardware. The events underlying this cause occurred at its principal offices in Houston. On May 10, 1974, the Union filed a petition with the Board seeking to represent at Handy Hardware

> [a]ll truckdrivers, production and maintenance employees, including stockmen, order fillers, warehouse helpers and porters but excluding office clerical employees, sales and commission employees, watchmen, guards, and supervisors as defined in the [National Labor Relations] Act. [61 Stat.

136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*].

The Board-conducted election on July 3, 1974, resulted in 19 votes for the Union, one opposed, and 13 ballots challenged. Since the contested ballots could not change the outcome of the election, no resolution as to them was attempted. On July 9, 1974, objections to the election were filed by Handy Hardware, complaining of 1) the alteration of a sample ballot included on an official Board notice of the election to show a vote for the Union; 2) threats to an employee in an attempt to acquire her signature on a Union authorization card; and 3) participation by a Handy Hardware supervisor in the propaganda campaign in behalf of the Union. The Board's regional director refused the requested hearing but did conduct his own investigations into the complaints. His report recommended that the objections be overruled and the election certified. Handy Hardware's exceptions to the regional director's report alleged misstatements and omissions. The Board adopted the findings of the regional director and certified the election.

Handy Hardware refused to bargain with the Union. The regional director issued a complaint on December 27, 1974, alleging this refusal as an unfair labor practice. Handy Hardware denied that a continuing request by the Union to bargain existed. It also attacked the suitability of the bargaining unit. On February 14, 1975, the Board issued an order to show cause why summary judgment against Handy Hardware should not be granted. After various responses by all sides, the Board granted the motion for summary judgment and found Handy Hardware guilty of unfair labor practices under 29 U.S.C. § 158(a)(1) and (5) in refusing to bargain.

[1, 2] We have examined the actions of the Board in light of the following legal principles. No post-election evidentiary hearing in a representation proceeding is required by statute. However, the Board has provided by regulation for a hearing when "substantial and material factual issues" are present. 29 C.F.R. § 102.69(f). Such a procedure comports with all requirements of due process. *N.L.R.B. v. White Knight Mfg. Co.*, 474 F.2d 1064 (5th Cir. 1973). Under this regulation, a party objecting to an election must present a prima facie case consisting of "specific evidence of specific events from or about specific people" which, if true, would necessitate the invalidation of the election. *N.L.R.B. v. Carlton McLendon Furniture Co., Inc.*, 488 F.2d 58, 61 (5th Cir. 1974); *United Steelworkers of America, AFL–CIO v. N.L.R.B.*, 496 F.2d 1342, 1348 (5th Cir. 1974). Because of the large degree of discretion accorded to the Board, considerable weight must be assigned to its determinations. Judicial review must be limited to the reasonableness of such determinations. *N.L.R.B. v. Golden Age Bev. Co.*, 415 F.2d 26, 29 (5th Cir. 1969). It does not matter that the reviewing court might have reached different conclusions if the Board has resolved the case reasonably. *White Knight Mfg. Co., supra.*

[3] In its order certifying the Union as a bargaining agent, the Board adopted the findings and conclusions of the regional director's report. In discussing Handy Hardware's complaint about the altered sample ballot portion of the Board poster announcing the election, the regional director found that on June 28, 1974, five days prior to the election, a superintendent at Handy Hardware saw a small crowd gathered around one of

the election notices. When the superintendent was noticed by the crowd, it started to disperse. One of the employees stated he had been "caught." It was noticed that an "X" was placed in both the "yes" and "no" squares on the sample ballot and that the name "Jorge" was written on the ballot, the same first name as that of the employee who stated he had been "caught." The sample ballot was replaced. Approximately three days after the election, another election notice was found, still posted, which has an "X" marked in the "yes" block signifying a vote for the Union. No evidence was presented as to the amount of time the sample ballot had remained posted in this defaced form.

In discounting the presence of the ballot found three days after the election, the regional director observed that no evidence was offered to show the alteration occurred prior to the election and found the almost instantaneous removal of the previous defaced sample ballot prevented any possible improper influence on the election. The potential impropriety of an altered official election notice is the chance that an employee will believe the Board, who is responsible for the posting of the notices, has signified its favoritism for one side in the election. It is too obvious to warrant further comment that the Board could reasonably deny credence to this argument in the instant situation. *N.L.R.B. v. John S. Barnes*, 478 F.2d 1105, 1107 (7th Cir. 1973).

[4, 5] The second objection concerned an alleged threat to a female employee to get her signature on a union authorization card, which the regional director recommend be overruled for lack of evidence. The only indication of the basis of this objection is a statement in a letter from Handy Hardware to the regional examiner. The letter maintained that, if a hearing were held, an employee named Angelina Hopkins would state that an employee was sent to her by another employee to demand "for the last time" that she sign a union authorization card but that she refused to sign. The burden is on the party seeking to overturn the election to show by specific evidence not only that unlawful acts occurred but also that such acts sufficiently inhibited the free choice of employees as to affect materially the results of the election. *Fones v. N.L.R.B.*, 431 F.2d 417, 420 (5th Cir. 1970). Handy Hardware's letter allegation without supporting evidence does not prove the occurrence of the event, much less demonstrate an adverse effect on the election. Assuming one such event occurred, a demand "for the last time" that an authorization card be signed is at best only ambiguously a threat. We find the Board's acceptance of this conclusion by the regional director to be reasonable.

[6] The final question resolved by the regional director concerns the possibility that an employee named Dennis Baker, who without question worked strenuously in behalf of the Union, was a company supervisor. It has frequently been held that the participation of a supervisor in a union election undermines the "laboratory conditions" necessary for an unfettered choice. *N.L.R.B. v. Decatur Transfer & Storage Co.*, 430 F.2d 763, 764 (5th Cir. 1970); *Home Town Foods, Inc. v. N.L.R.B.*, 416 F.2d 392, 396 (5th Cir. 1969); *Turner's Express, Inc. v. N.L.R.B.*, 456 F.2d 289, 290 (4th Cir. 1972). As explained in various Board opinions, the threat posed by the participation of a supervisor is twofold. First, if a supervisor takes a stance in favor of the Union, even though the employer does not otherwise indicate its position, his

association with the management hierarchy, in an employee's perception, could indicate employer support for the Union. Second, if a supervisor influences hiring and firing or in other respects holds substantial power over an employee, the supervisor's participation in the election could have a coercive effect on other employees. *Stevenson Equip. Co.*, 174 N.L.R.B. No. 865; *Turners Express, Inc.*, 189 N.L.R.B. No. 106. This is true even if the employer, as here, openly urged the defeat of the Union, since the supervisor might well be able to recommend if not actually cause the dismissal or other adverse treatment of the employee, disguising the true motives of the recommendation in innumerable ways. The likelihood of such occurrences is less important than the possibility that an employee might fear such retribution and act accordingly.

[7] The issue of whether an employee is actually a supervisor is a recurring and difficult one. *N.L.R.B. v. Security Guard Serv., Inc.*, 384 F.2d 143, 145 (5th Cir. 1967). The standards for determining this question are established by the definition of "supervisor" contained in 29 U.S.C. § 152(11).[1] The Board's determination on this issue is entitled to great weight, as the expertise of the Board is uniquely capable of measuring the subtle gradations of authority which delineate the supervisor from non-supervisory personnel. *Trailmobile Div., Pullman, Inc. v. N.L.R.B.*, 379 F.2d 419, 422 (5th Cir. 1967). However, we find it unnecessary to weigh the evidence to see if the Board has reached a reasonable conclusion in this thorny area because we find beyond peradventure that a secondary conclusion reached by the Board is sound.

[8] The evidence disclosed that when Baker began working for the Union after the petition for a Union election was filed, Baker went to his immediate superior and asked to be relieved of such supervisory duties as he had pending the election. His superior, Superintendent Smith, demanded that he remain in his old duties as no immediate replacement was available. Baker refused and reverted to his former work. This resulted in Baker's discharge six days later. Contemporaneous with his dismissal, the company announced that Baker was being discharged since he was a "supervisor" and had been engaging in Union activities. Had Baker worked for the Union while occupying a supervisory role, Handy Hardware could properly have dismissed him for this activity. *Florida Power & Light Co. v. Internat. Bro. of Elec. Workers, Local 641*, 471 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974). However, our pretermission of a decision as to his supervisory status likewise pretermits adjudication of the correctness of his discharge. It was reasonable for the Board to determine that since Baker was not employed by Handy Hardware during the last six weeks of the election period, impermissible coercion resulting from his favoritism for the Union was inconceivable.

To demonstrate the potential for such coercion, Handy Hardware offered an

1. . . . . .
(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
. . . . . .

affidavit of an employee which stated that a few nights before the election the affiant attended a meeting of Union sympathizers. It was asserted by someone at the meeting that Baker did not have to be concerned about his job since he would be able to regain it imminently. The basis for this statement apparently was the fact that Baker had filed an unfair labor practice complaint with the Board concerning his firing. Following the election, his complaint was settled and he was rehired by Handy Hardware. Handy Hardware's argument is indeed attenuated. First it assumes that Baker was a supervisor; next that employees knew, although then discharged, he probably would be reemployed, and reemployed in a supervisory capacity. One would then have to conclude that this likelihood of reemployment acted coercively on employees who feared that, once rehired, Baker would take retribution against them if they had not supported the Union.

The question of whether this conduct or, more aptly, probability of future conduct, tended to interfere with employees' free choice is primarily committed to the discretion of the Board. *N.L.R.B. v. Sumter Plywood Corp.*, 535 F.2d 917 (5th Cir., 1976). We find that discretion was reasonably exercised in this case.

[9] The final contention raised by Handy Hardware alleged that during the unfair labor practice proceeding initiated on December 27, 1974, the General Counsel of the Board was improperly allowed in effect to amend his complaint without complying with statutory requirements, 29 U.S.C. § 160(b). The challenged action related to one paragraph of the complaint which alleged that the Union had continued from November 15, 1974, "to date" to request that Handy Hardware bargain. In its answer, Handy Hardware alleged that it did not have knowledge sufficient to reply to this statement. The General Counsel then filed a motion to transfer and continue the case before the Board and for summary judgment. In this motion, no mention was made of the statement by Handy Hardware that it had no knowledge of the Union's continuing attempts to bargain. Subsequently the motion for summary judgment was amended, admitting that the allegation concerning lack of knowledge as to requests by the Union to bargain was overlooked. Three documents were appended allegedly demonstrating these requests, one of which post-dated the December 27 complaint. Handy Hardware refers us to several precedents which have denied enforcement of Board orders which were based on findings of acts constituting unfair labor practices, when such acts were not alleged in the complaint.

Two operative rules need to be considered in reaching out decision. The Board's own regulation provides, 29 C.F.R. § 102.15:

> . . . The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

The Administrative Procedure Act, 5 U.S.C. § 554(b) states:

> Persons entitled to notice of an agency hearing shall be timely informed of—
>
> . . . . . .
>
> (3) the matters of fact and law asserted.

However, these standards are not to be applied with the particularity of formal court pleadings. *Bob's Casing Crews, Inc. v. N.L.R.B.*, 458 F.2d 1301 (5th Cir. 1972). It is the function of these pleadings to put the employer on notice as to the basis of the charges against him. *Engineers & Fabricators, Inc. v. N.L.R.B.*, 376 F.2d 482 (5th Cir. 1963); *N.L.R.B. v. Scenic Sportswear*, 475 F.2d 1226 (6th Cir. 1973).

The objection raised by Handy Hardware is that though the complaint alleged refusal to bargain "to date," *i. e.*, the date of the complaint, the Board considered evidence of a later refusal without amending the complaint. The case upon which Handy Hardware principally relies did not deal with an enlargement of the time period in which violations occurred, but instead dealt with a complaint which specifically alleged two violations, did not contain a "catch-all" clause which would apprise the employer that other acts might be alleged as violations, and resulted in a conclusion by the court that the employer had been denied due process when other acts were proven and relied upon in the Board's decision. *Boyle's Famous Corned Beef Co. v. N.L.R.B.*, 400 F.2d 154 (8th Cir. 1967).

The additional instance of failure to bargain proven here did not constitute a separate unfair labor practice but was instead a continuation of the same illegality alleged in the complaint. There was no specific reliance by the Board upon the complained-of evidence of refusal to bargain. Moreover, just as courts have allowed consideration of events prior to the six month statute of limitations governing the filing of charges of unfair labor practices in order to "cast light on those events within the six months period," *N.L.R.B. v. Homes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 718 (9th Cir. 1972); *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822, 41 L.Ed.2d 832 (1960), so the same principle is applicable to such closely related events post-dating the complaint. *Stewart Die Casting Corp. v. N.L.R.B.*, 114 F.2d 849, 857 (7th Cir. 1940), *cert. denied*, 312 U.S. 680, 61 S.Ct. 449, 85 L.Ed. 1119 (1941), *petition for order modifying denied*, 129 F.2d 481 (1942).

As the alleged violation in the present case was a failure to bargain, the continuing failure past the date of the complaint was relevant and obviously an outgrowth of the earlier allegation. Handy Hardware was sufficiently notified by the complaint of the grounds of the charges against it and was not prejudiced by the amended motion of the Counsel to the General Counsel.

The order of the Board that Handy Hardware must bargain with the Union is therefore

ENFORCED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	§	
v.	§	No. 76-1793
HANDY HARDWARE WHOLESALE, INC., Respondent	§	

JUDGMENT

Before: DYER, CLARK, and HILL, Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, Handy Hardware Wholesale, Inc., of Houston, Texas, its officers, agents, successors, and assigns, on January 16, 1976. The Court, having carefully considered the birefs (sic) and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on November 18, 1976, handed down its decision granting enforcement of the Board's Order. In conformity there-

with, its is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Handy Hardware Wholesale, Inc., Houston, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: December 10, 1976

Issued as Mandate: January 26, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1793

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

HANDY HARDWARE WHOLESALE, INC.,

Respondent,

- - - -

On Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

- - - -

ON PETITION FOR REHEARING
January 10, 1977

Before DYER, CLARK and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

Supreme Court, U. S.
FILED
MAY 23 1977
MICHAEL RODAK, JR., CLERK

No. 76-1358

In the Supreme Court of the United States

OCTOBER TERM, 1976

HANDY HARDWARE WHOLESALE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General,
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Attorney,
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Washington, D. C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1358

HANDY HARDWARE WHOLESALE, INC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The opinion of the court of appeals (Pet. App. A-23 to A-29) is reported at 542 F. 2d 935. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-22) are reported at 222 NLRB 373. The Board's decision in the related representation case is set forth at R. 20-25 and R. 51.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A-30 to A-31) was entered on December 10, 1976, and a timely petition for rehearing was denied on January

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[1] "R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

10, 1977 (Pet. App. A-32).[2] The petition for a writ of certiorari was filed on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board should have held an evidentiary hearing to explore petitioner's contention that union organizational activity by an alleged supervisor during a representation election campaign warranted setting aside the election.

2. Whether the Board, in finding that petitioner had unlawfully refused to bargain with the Union, properly considered evidence showing that pre-complaint refusal to bargain continued into the post-complaint period.

STATEMENT

1. The Regional Director of the National Labor Relations Board conducted an election among certain employees at the Houston, Texas, facility of petitioner (the Company) (Pet. App. A-5). The Union[3] won the election by a vote of 19 to 1 (*ibid.*).[4] The Company objected to the election on the ground, *inter alia*, that the Union utilized the services of a Company supervisor, Dennis Baker, in its organizational campaign (R. 6).

The Regional Director conducted an administrative investigation, after which he concluded that Baker, after being named as an employee organizer, had approached his

---

[2]On April 6, 1977, Mr. Justice Powell denied petitioner's motion for a stay of the judgment pending the disposition of the petition for certiorari.

[3]Teamsters, General Drivers, Warehousemen and Helpers, Local Union No. 968, affiliated with the International Brotherhood of Teamsters.

[4]Challenges to 13 ballots were not resolved because they could not affect the results of the election (Pet. App. A-5).

superior and asked to be relieved of his "supervisory" functions. The superior agreed, and thereafter Baker performed only the duties of stocking and order pulling in the Company's warehouse (R. 23).[5] The next week Baker was discharged, and the Company's President called a meeting of employees to explain that Baker's termination resulted from his union activities (R. 24).

Baker filed a charge with the Board, alleging a violation of Section 8(a)(3) and (1) of the Act. After the election Baker and the Company entered into a settlement agreement; Baker was offered, but rejected, reinstatement, and he was paid back wages (R. 23 n. 3).

The Regional Director, assuming *arguendo* that Baker was a supervisor until relieved of his duties and that all of the Company's allegations were accurate,[6] concluded that Baker's activities did not warrant setting aside the election. Noting that Baker was fired six weeks before the election, and that the employees were simultaneously informed that

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[5]Baker was initially employed in June 1972 as a stocker and order-filler in the warehouse. Sometime later he was placed in charge of a portion of the warehouse and, in that capacity, routinely directed the work of three to five other employees (R. 22-23). Even after his promotion, however, Baker continued to perform manual labor—either stocking or filling orders—for the better part of each day (R. 22). He had no authority to hire or discharge employees, grant time off, or assign overtime, and had never recommended disciplinary action against employees (R. 23). The Regional Director concluded that Baker was an employee and not a supervisor within the meaning of the Act (*ibid.*).

[6]The Company alleged that Baker attended a meeting of employees held at the union hall shortly before the election. During this meeting someone stated that Baker did not have to be concerned about his job because, in view of his pending charge against the Company, he would soon be reinstated. The Company also alleged that Baker held a meeting of employees on the plant parking lot after being fired but before the election (R. 15-16).

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he had been fired for union activities, the Regional Director found that Baker's actions could not have induced the employees to believe that the Company favored the Union. Similarly, the Regional Director found that Baker's discharge before the election eliminated any chance that employees could have been induced to vote for the Union out of fear that Baker otherwise would use his supervisory position to punish employees voting against the Union (R. 24).

The Board sustained the Regional Director and certified the Union as the representative of the Company's employees (R. 51).

2. On December 27, 1974, the General Counsel issued a complaint charging that on November 15, 1974, and thereafter, the Company had refused to bargain with the Union, although the Union had requested and was continuing to request that the Company do so (Pet. App. A-2 to A-3). When the Company's answer reiterated that the election should be set aside for reasons previously considered and rejected in the representation proceeding, the Board's General Counsel moved for summary judgment (Pet. App. A-3).

The General Counsel later filed an amended motion for summary judgment, attaching as exhibits three letters from the Union to the Company, dated November 15 and December 5, 1974, and January 16, 1975, requesting the Company to bargain (Pet. App. A-8 to A-9). In response to a notice to show cause why the amended motion should not be granted, the Company denied knowledge of requests to bargain and objected to the attachment of the January 16, 1975, letter because it post-dated the complaint.

The Board granted the amended motion for summary judgment. The Board stated (Pet. App. A-9, footnote omitted):

> The contents of these letters have not been controverted by the [Company] and therefore are deemed to be true, and establish requests to bargain from November 15, 1974. Further, the allegation * * * that the [Company] has failed to respond to the requests despite the passage of a reasonable time stands uncontroverted and is accepted as true, and establishes the refusal to bargain as of November 15, 1974.

3. The court of appeals enforced the Board's order. The court found that the objection based on Baker's activity was properly rejected because it "was reasonable for the Board to determine that since Baker was not employed by [the Company] during the last six weeks of the election period, impermissible coercion resulting from his favoritism for the Union was inconceivable" (Pet. App. A-27). The court rejected the argument that events following Baker's discharge—the filing of the unfair labor practice charge, the issuance of a complaint thereon, and the statements allegedly made at the pre-election meeting concerning Baker's possible reemployment—required an evidentiary hearing. The court explained (Pet. App. A-28, citation omitted):

> [The Company's] argument is indeed attenuated. First it assumes that Baker was a supervisor; next that employees knew, although then discharged, he probably would be reemployed, and reemployed in a supervisory capacity. One would then have to conclude that this likelihood of reemployment acted coercively on employees who feared that, once rehired, Baker would take retribution against them if they had not supported the Union.
>
> The question of whether this conduct or, more aptly, probability of future conduct, tended to interfere with employees' free choice is primarily committed to the discretion of the Board. We find that discretion was reasonably exercised in this case.

The court also rejected the Company's argument that the General Counsel's reference to events after the date of the complaint violated requirements of the Administrative Procedure Act and the Board's own regulations, concluding (Pet. App. A-29):

> The additional instance of failure to bargain proven here did not constitute a separate unfair labor practice but was instead a continuation of the same illegality alleged in the complaint. There was no specific reliance by the Board upon the complained-of evidence of refusal to bargain. * * *
>
> As the alleged violation in the present case was a failure to bargain, the continuing failure past the date of the complaint was relevant and obviously an outgrowth of the earlier allegation. [The Company] was sufficiently notified by the complaint of the grounds of the charges against it and was not prejudiced by the amended motion [for summary judgment].

ARGUMENT

1. There is no substance to petitioner's claim (Pet. 10-11, 20-22) that the Board should have held an evidentiary hearing on its objection respecting Baker's activity. A hearing is required only where substantial and material factual issues are raised. See *National Labor Relations Board* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 75-76 (C.A. 5); *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249-250 (C.A. 4). The Board properly found that petitioner had failed to meet this burden. Even if all of petitioner's factual assertions could be substantiated, they would not demonstrate that Baker's activity tended to interfere with employee free choice in the

election. See the court of appeals' discussion, which considers and rejects petitioner's arguments (Pet. App. A-26 to A-28).[7]

2. Petitioner's further contention (Pet. 22-25) that the Board violated the notice requirements of the Administrative Procedure Act and its own rules is incorrect. As the court of appeals explained (Pet. App. A-28 to A-29), petitioner was not prejudiced by the General Counsel's addition, in the amended motion for summary judgment, of a letter showing that petitioner's pre-complaint refusal to bargain continued after the filing of the complaint.

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[7] There is no evidentiary basis for petitioner's statement (Pet. 9) that on at least one occasion before his discharge Baker sent one employee to threaten another employee in an effort to obtain a signature on a union authorization card. This allegation formed the basis for a separate objection before the Board, which was overruled because petitioner failed to submit any supporting evidence (R. 22). The court of appeals approved the Board's disposition of this objection as well (Pet. App. A-26).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
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MAY 1977.

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